

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

**Chapter 7 Bankruptcy
Bky 04-327235 (GFK)
Adv. 04-3338**

Bradley R. Thayer and Judith N. Thayer,

Debtors.

In re:

American Residential Mortgage, LP,

Plaintiff,

v.

Bradley R. Thayer and Judith N. Thayer,

Defendants.

DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

To: United States Trustee and other entities specified in Local Rule 2002-1(b).

1. The Defendants in the above-referenced adversary proceeding, Bradley R. Thayer and Judith N. Thayer (the "Thayers"), moves the Court for summary judgment and an order dismissing Plaintiffs' claims and granting Defendants' Counterclaims pursuant to Bankr. Rule 7056 and Fed. R. Civ. P. 56(b).
2. The Court will hold a hearing on this motion at 3:00 p.m. on October 25,

2004 in Courtroom No. 228B, United States Courthouse, 700 Federal Building, 316 North Robert Street, St. Paul, MN 55101.

3. Any response to this motion must be filed and delivered not later than October 20, 2004, which is three days before the time set for the hearing (excluding Saturdays, Sundays, and legal holidays) or mailed not later than October 18, 2004 which is seven days before the time set for the hearing excluding Saturdays, Sundays, and legal holidays).

UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING

4. The Court has jurisdiction over this motion pursuant to 28 U.S.C. §§157 and 1334. This proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(K). The petition commencing this chapter 7 Case was filed on May 5, 2004 (the "Filing Date").

5. This motion arises under Fed. R. Bankr. 7056(a). This motion is filed under Fed R. Bankr. P. 9014 and Local Rules 9013-1 through 3. Movants request a hearing dismissing Plaintiffs' claims and granting Defendants' Counterclaims.

I. DEFENDANTS MOVE FOR SUMMARY JUDGMENT IN THEIR FAVOR ON PLAINTIFF'S CLAIMS PURSUANT TO FED. R. CIV. P. 56(b)

6. Defendants' move to dismiss Count I (Existence of Lien) of Plaintiff's Adversary Complaint and Count II (Materially False Financial Statement) pursuant to Bankr. Rule 7056 and Fed. R. Civ. P. 56(b).

7. The dismissal of Count II of Plaintiffs' Adversary Complaint is dependant on this Court granting part or all of the relief requested by Defendants based upon mootness.

II. DEFENDANTS MOVE FOR SUMMARY JUDGMENT ON COUNTS I AND II THEIR COUNTERCLAIMS PURSUANT TO FED. R. CIV. P. 56(a)

8. Defendants further seek an order granting summary judgment in their favor on Counts I (Disallowance of Claims) and II of their Counterclaims (Declaratory Judgment Specific Performance).

III. DEFENDANTS' MOVE FOR SUMMARY JUDGMENT IN THEIR FAVOR ON DEFENDANTS' AFFIRMATIVE DEFENSE OF PAYMENT UNDER FED. R. CIV. P. 56(b).

9. Defendants further seek an order granting summary judgment in their favor its Affirmative Defense of Payment which it asserted in its Answer to the Adversary Complaint of Plaintiff.

10. The facts and legal bases for Defendants Motion are set more fully in its Memorandum of Law and supporting affidavits and exhibits. Defendants' Memorandum of Law is incorporated by reference to this Motion.

11. Defendants seek an order pursuant to Bankr. R. 7070 and F. R. Civ. P. 70 as otherwise provided by law discharging the mortgage on Defendants' homestead which is claimed by Plaintiff.

Respectfully submitted,

THE OLIVER GROUP, PLC

Dated: 10 October 2004

/s/ Karl A. Oliver

Karl A. Oliver, Esq., # 0269852
1935 W. County Road B2, Suite 415
Saint Paul, Minnesota 55113
Telephone: 651-636-7960

**ATTORNEYS FOR DEFENDANTS
BRADLEY THAYER AND JUDITH
THAYER**

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

**Chapter 7 Bankruptcy
Bky 04-327235 (GFK)
Adv. 04-3338**

Bradley R. Thayer and Judith N. Thayer,

Debtors.

In re:

American Residential Mortgage, LP,

Plaintiff,

v.

Bradley R. Thayer and Judith N. Thayer,

Defendants.

**DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION
TO MOTION TO DISMISS AND IN SUPPORT OF CROSS MOTION FOR
SUMMARY JUDGMENT**

Defendants, Bradley R. Thayer and Judith N. Thayer (the "Thayers"), hereby submit their Memorandum of Law in Opposition to Plaintiff, American Residential Mortgage, LP, a Minnesota limited partnership's Motion to Dismiss and for their Motion for Summary Judgment. The Thayers have combined memoranda on the two motions for reasons of judicial economy and because the substantial overlap of the facts and legal issues involved.

SUMMARY

This matter revolves around the interplay between the Truth in Lending Act and the Bankruptcy Code. In summary, the Thayers sought to refinance their TCF Mortgage with Plaintiff. The Thayers canceled their loan with Plaintiff within the Truth in Lending Act's three-day rescission period.

Plaintiff failed to honor the Thayers' rescission and instead distributed the loan proceeds, thus paying off TCF in full as well as two other credit card debts that the Thayers owed. TCF accepted the payment and has admitted that the Thayers' debt was paid in full. Approximately six months after the Thayers' cancellation, TCF allegedly "assigned" the paid debt to Plaintiff.

Because the distribution took place even though the Thayers rescinded within the three-day period, there is no duty to tender funds back to Plaintiff under TILA. Under TILA rescission, transactions with third parties, such as the payoff to TCF, are not void, rather only the transaction between the consumer and the refinancing lender is void. Even if there were a duty to tender, such debt obligation is unsecured and dischargeable.

THE RELIEF REQUESTED BY THE THAYERS

The Thayers move to dismiss Count I (Existence of Lien) of Plaintiff's Adversary Complaint and Count II (Materially False Financial Statement) pursuant to Bankr. Rule 7056 and Fed. R. Civ. P. 56(b). The dismissal of Count II of Plaintiff's Adversary Complaint is dependant on this Court granting part or all of the relief requested by Defendants based upon mootness.

The Thayers further seek an order granting summary judgment in their favor on Counts I (Disallowance of Claims) and II (Declaratory Judgment Specific Performance) of their Counterclaims. The Thayers also seek an order granting summary judgment in their favor of their affirmative defense of payment which it asserted in its Answer. Moreover, the Thayers oppose Plaintiffs' Motion to Dismiss Counts III and IV of the Thayers' Counterclaims.

FACTUAL BACKGROUND

1. On or about September 11, 2002, the Thayers executed a note in favor of Plaintiff in the original principal amount of \$157,700 (the "TCF Note")(Plaintiff's Adversary Complaint ¶ 1)("Ad. Com. ¶__").

2. The TCF Note was secured by the the Thayers' residence commonly known as 9337 Jarrod Avenue, Cottage Grove, Minnesota 55016. A true and correct copy of the TCF Mortgage. (Ad. Com. ¶ 2).

8. As shown on an Ownership and Encumbrances Report attached hereto as Exhibit C, the TCF Mortgage was recorded as Instrument No. 3277617 on November 13, 2002 in the County Recorder's office of Washington County, Minnesota.)("Ad. Com. ¶ 8).

9. On or about September 11, 2002 the TCF Note and TCF Mortgage were assigned by Plaintiff to TCF Mortgage Corporation ("TCF"), and the assignment of the TCF Mortgage was recorded on November 13, 2002 as Instrument No. 3277618.)(Ad. Com. ¶ 9).

American Residential Mortgage Transaction and the Thayers' Recission

10. The Thayers decided to refinance the TCF Mortgage in August of 2003.

(Affidavit of Judy Thayer ¶ 3 ("Aff. J. Thayer ¶ 3").

11. On or about August 25, 2003, the Thayers signed a new note in the principal amount of \$170,000 and the Thayers executed a new mortgage with ARM, the proceeds of which were to be used to pay the entire outstanding balance in the amount of \$151,061.76 on the TCF Note, to pay \$8,548.34 to Discover, to pay the closing costs of the loan, and to pay out \$4,093.46 directly to Defendant Bradley Thayer (the "Cancelled Loan"). (Ad. Com. ¶ 10).

12. On August 28, 2003, pursuant to 12 C.F.R. § 226.23 (Regulation Z), both Brad and Judy Thayer rescinded the new ARM loan by signing the Notice of Right to Cancel provided to each of them at the loan closing and mailing, via certified mail, the cancellation to ARM at the address provided in the notice. (Ad. Com. ¶ 11).

**Defendant Fails to Comply With the Truth in Lending Act's
Delay in Performance Rule**

13. On August 29, 2004, ARM signed the certified mail receipt acknowledging receipt of the Notice of Cancellation. (Ex. A. to Aff. J. Thayer ¶ 4)(copy of certified mail receipt).

14. The funds subject to the ARM Loan were released to TCF and to Discover on or about August 29, 2003. (Aff. J. Thayer ¶ 6).

15. ARM did not delay performance until they were sure that the Thayers had

not canceled under the Truth in Lending Act. (Ad. Com. ¶ 14).

16. The proceeds were received by Discover on August 30, 2003, thus paying off the account in full. (Aff. J. Thayer ¶ 7).

17. On or about August 29, 2004, ARM also mailed a check in the amount of \$4,093.46 to Mr. Thayer, which he returned to ARM uncashed. (Ad. Com. ¶ 16).

18. In late August and/or early September of 2003, the TCF Note was paid in full through the proceeds of the Thayers' ARM Loan. (Aff. J. Thayer §§¶ 10-15)

TCF Admits that the Thayers' Obligation Was Fully Satisfied

19. In a letter to the Thayers dated September 17th, 2003, TCF, confirmed that the TCF Loan had been fully paid. (Aff. J. Thayer ¶ 10 and Ex. B).

20. The letter stated that the Thayers' loan with TCF was "paid in full." (emphasis added). (Aff. J. Thayer ¶ 10 and Ex. B).

21. TCF also the Thayers a Final Escrow Account Disclosure dated September 8, 2003 which stated that the "LOAN WAS PAID OFF." (emphasis in original). (Aff. of J. Thayer ¶ 12 and Ex. C).

18. Several months later, on February 5, 2004, TCF again confirmed that the TCF Note had been paid in full and fully satisfied. (Ex. D to Aff. J. Thayer ¶ 13-14).

19. TCF in a letter to the Thayers dated February 5, 2004, stated:

The above-referenced loan was paid in full SEPTEMBER 2, 2003. A satisfaction/release of mortgage was mailed to the party that remitted the payoff funds. At that time, the satisfaction/release of mortgage should

have been taken to the County Recorder's Office and recorded removing the lien from the property.

(emphasis in original) (Ex. D to Aff. J. Thayer).

18. On February 18, 2004, TCF purportedly "assigned" the TCF Note to ARM. *See* (Affidavit of K. Oliver ¶ 3)(February 18, 2004 Assignment)("Aff. K. Oliver ¶ 3").

22. The assignment of the TCF Mortgage from TCF to ARM was recorded on June 24, 2004 as Instrument No. 3277617. (Ad. Com. ¶ 11).

16. On May 5, 2004, the Thayers filed for bankruptcy under Chapter 7 and the Thayers listed ARM as a creditor and estimated that amount of money that ARM may be claiming to be \$170,000. *See* (Schedule B of the Thayers' Bankruptcy Schedules).

18. The Chapter 7 Trustee indicated to your undersigned that she was not interested in pursuing the TILA and related claims and that she wanted to sell them. (Aff. of K. Oliver ¶ 4)

17. On August 27, 2004, the Thayers tendered \$650.00 to the Chapter 7 Trustee. (Aff. of K. Oliver ¶ 5).

17. Plaintiff outbid the Thayers by about \$100.00. There were several rounds of bidding and Plaintiffs' continually raised their bid on successive rounds of bidding making the Thayers attempt to purchase the TILA and other claims fruitless due to their economic circumstances vis-à-vis a mortgage company. (Aff. of K. Oliver ¶ 6).

18. The tender was to be accepted but for the Plaintiffs' bid; the

Thayers informed the Chapter 7 Trustee that took issue with the Trustee's ability to assign a TILA claims to a non-consumer third party under applicable law. (Aff. of K. Oliver ¶ 7).

19. The Thayer felt they had to act quickly as it is arguable that the statute of limitations was about to run out and they therefore sought a declaratory judgment that the Court should rule that the assignment to Plaintiff was invalid and that the TILA should vest to the Thayers. (Aff. of K. Oliver ¶ 8).

STANDARD OF REVIEW

Set forth below, are the two legal standards on the motions in the instant matter. As discussed below, the standard to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted has a much higher threshold than that of the standard for summary judgment.

Because Defendants are bringing in material outside the pleadings in opposing Plaintiffs' Motion to Dismiss, the proper standard should be that of summary judgment. However, if the court did apply a Rule 12(b)(6) analysis, the following standard apply.

A. Standard For Motion to Dismiss Under Rule 12(b)(6)

In adversary proceedings, Fed. R. Bankr. P. 7012 provides that Fed. R. Civ. P. 12(b)(6) applies. Plaintiff has moved to dismiss under Rule 12(b)(6). The standard of review under both motions, however, are the same. A defendant's burden is extremely high.

In examining a Rule 12(b) motion, courts examine the facts and claims pled in the defendant's counterclaim to see if a valid claim is pled. Because dismissing under Rule

12(b)(6) is a severe remedy, “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41 (1957)(emphasis added); *Hinshon v. King & Spalding*, 467 U.S. 69 (1984); *Palmer v. Tracor, Inc.*, 856 F.2d 1131,1132 (8th Cir. 1988). Significantly, for purposes of the motion to dismiss, the court takes the complaint’s allegations as true and construes all reasonable interferences in the pleader’s favor. *Scheur v. Rhodes*, 416 U.S. 232, 236 (1974); *Palmer*, 856 F.2d at 1132. Even if the court may initially believe, a claimant is unlikely to prevail based on the pleadings, the court may not dismiss under 12(b)(6). *Neitzke v. Williams*, 109 S.Ct. 1827 (1989) and *Bramlet v. Wilson*, 495 F.2d 714 (8th Cir. 1974).

B. Standard for Summary Judgment

In adversary proceedings, Fed. R. Bankr. P. 7056 provides that Fed. R. Civ. P. 56 applies. A motion for summary judgment is essentially a two-step inquiry. The first question is whether there is a genuine issue as to any material fact. Fed. R. Civ. P. 56(c). Second, the inquiry becomes whether the movant is entitled to judgment as a matter of law. *Id.*

For the purposes of summary judgment, materiality of facts is measured by whether a given fact might affect the outcome of a claim or defense under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Accordingly, a court must identify the elements of the claims or defense at issue before examining the evidence or record for the existence of material fact disputes. *In re Jolly’s Inc.*, 188 B.R. 832, 838 n.7 (Bankr. D. Minn. 1995). Evidence from the respective sides must then be linked to one or more of those identified elements. *In re Jolly’s Inc.*, 188 B.R. at 837.

In other words, a party may move for summary judgment by gleaning the elements of its claim, garnering its evidence and pointing out that the evidence meets all of the elements and does not establish any affirmative defense. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *In re Mathern*, 137 B.R. 311, 314 (Bankr. D. Minn. 1992).

Assuming the moving party has met its initial burden, the non-moving party then bears the burden of production of evidence; it can avoid a grant of summary judgment for the defendant only by producing evidence that would support findings in its favor on the elements in question. *Anderson*, 477 U.S. at 248. The non-moving party can also move for summary judgment on any claim or defense and same analysis applies.

A moving party must also demonstrate that it is entitled to a judgment as a matter of law. This inquiry can include: a moving party showing that on the legal theory it relies to demonstrate the facts it has produced that entitle it to relief under its legal theory. The non-movant, in response, can take the position that the movant has failed to make out a *prima facie* case or that the facts, even if undisputed, do not meet the elements of the movant's claim or defense or otherwise fail as a matter of law. *Celotex*, 477 U.S. at 325-26.

DISCUSSION

The issues in this case are intertwined to some extent by the Truth in Lending Act ("TILA") 15 U.S.C §§1601-1666j. In order to put the Thayers' defense of payment and their counterclaims in perspective, one must understand the backdrop of TILA in this matter.

I. THE TRUTH IN LENDING ACT: GENERAL PRINCIPLES

TILA is designed to protect borrowers and “to deter generally illegalities which are are only rarely uncovered and punished.” *Fairley v. Turan-Foley Imports, Inc.* 65 F.3d 475, 480 (3rd Cir. 1995)(quoting *Williams v. Public Fin. Corp.*, 598 F.2d 349, 356 (5th Cir. 1979)). TILA is remedial and must be liberally construed in favor of borrowers. *Pfennig v. Household Credit Servs, Inc.*, 295 F.3d 522 (6th Cir. 2002). TILA is a strict liability statute and strict compliance is required. *Porter v. Mid-Penn Consumer Discount*, 961 F.2d 1066 (3rd Cir. 1992). Liability must be imposed even for technical violations. *In re Norris*, 138 B.R. 467(E.D. Pa. 1991); see *In re Jackson*, 245 B.R. 23 (Bankr. E.D. Pa. 2000)(summarizing the consequences of a rescission violation by a creditor). Failure to comply with TILA and Reg. Z’s requirements may subject a creditor to a multitude of penalties including the right to rescind the transaction, elimination of finance charges and civil penalties, actual damages, statutory damages and attorney’s fees. 15 U.S.C. §§1635, 1640. Further, there is a separate penal provision imposing criminal liability for willful and knowing violations. 15 U.S.C. § 1611.

A. A Consumer’s Unconditional Three Day Right to Rescind Under TILA and Regulation Z.

Under TILA, consumers have three days to cancel a refinancing transaction from the day the loan documents are executed. 15 U.S.C. §1635(a); 12 CFR § 226.23(b)(2) and (5). This three day cooling off period is a cornerstone of TILA as it allows consumers time reflect on whether they want take a loan and have a mortgage on their residence. *Rudisell v. Fifth Third Bank*, 622 F.2d 243, 249 n.9 (6th Cir. 1980). If a consumer wants to cancel they simply deliver or mail the creditor a notice on cancellation form which the creditor must have provided at the closing. 12 C.F.R. §226(a) and (b).

Once the consumer rescinds, the security interest or lien arising by operation of law on the property becomes automatically void. 15 U.S.C. §§ 1635(b); 226.15(d)(1), 226.23(d)(1). *Gill v. Mid-Penn Consumer Discount Co.*, 671 F.Supp. 1021,1026 (E.D. Pa. 1987). The creditor, under TILA, then has twenty days to return any money or property given as earnest money, down payment or otherwise as the consumer has no legal liability for any such charges upon rescission. 15 U.S.C. § 1635(b).

B. The Delay in Performance Rule: Creditors May Not Distribute Funds if the Consumer Rescinds Within the Three Day Period Under TILA and Regulation Z.

Creditors are forbidden to distribute any of the loan proceeds not only during the three-day period, but several days after as well to allow receipt of a notice of cancellation by mail. 12 C.F.R. § 226.23(c). The creditor's requirement to delay performance is commonly called the "delay in performance rule." Cancellation is complete upon mailing. Typically, creditors will not distribute funds without the consumer's written acknowledged that they have not canceled which is signed by the consumer after the three days has passed. Reg. Z §§ 226.15(c) and 226.23(c).¹ Federal Reserve Board Official Staff Commentary § 226.15(c) provides:

The creditor must wait until it is reasonably satisfied that the consumer has not rescinded. For example, the creditor may satisfy itself by doing one of the following: Within a reasonable time after expiration of the rescission prior to allow for delivery of a mailed notice. Or obtaining a written statement from the consumer that the right has not been exercised.

¹ TILA provides an extended right to rescind up to three years after the transaction at issue if the creditor fails to provide proper disclosures. The overwhelming majority of the case law on TILA concerns cancellation during the extended three-year period rather than in cases where the consumer cancels during the initial three day cooling off period.

Congress has delegated to the Federal Reserve Board the authority to make binding interpretations of TILA and Reg. Z. and its interpretations are binding upon courts.

Household Credit Services Inc. v. Pfennig, 124 S.Ct. 1741, 1746, ___ U.S. ___ (2004).

II. DEBT OWING TO A REFINANCING LENDER WHEN A CONSUMER RESCINDS IS UNSECURED

A. Rescission Under TILA Does Not Void Transactions With Third Parties, Rather in Certain Circumstances, the Consumer May Have A Duty To Tender Proceeds Back to the Refinancing Lender

A cancellation under TILA does not void transactions between the consumer/creditor and third parties such as the consumer's other creditors who are being paid off as part of the refinancing and there is no authority in TILA, Reg. Z, or in case law supporting such a proposition. Rather than invalidating transactions with third parties, there is a requirement, in most instances, that the consumer tender back monies that have been distributed.

B. When Debt that Was Improperly Disbursed During the Three Day Cooling Off Period, the Consumer Is Not Required to Tender the Funds Back Under TILA

A premature release of funds when the consumer rescinds within the three day rescission period can have disastrous consequences for a lender who fails to comply with its TILA requirements because the consumer's tender is not secured by any mortgage. *In re Celona*, 90 B.R. 104 (E.D. Pa. 1988); *Curry v. Fidelity Consumer Discount Company*, 656 F.Supp. 1129 1130-31 (E. D. Pa. 1987); *Solis v. Fidelity Consumer Discount Co.*, 58 B.R. 983, 986 (E.D. Pa. 1987).

Significantly, under the TILA there is no requirement to tender if the monies are improperly released if the consumer cancels within the three day period. If a creditor does not comply with a consumer's rescission, there is no duty to tender. *In re Jackson*,

230 B.R. 508 (Bankr. E.D. Pa. 2000)(negation of tender duty is appropriate where the creditor does not comply with rescission notice); *In re Ralls*, 230 B.R. 508 (Bankr. E. D. Pa. 1999); *Family Financial Services v. Spender*, 677 A.2d 469 (Conn. Ct. App. 1996)(creditor's failure to honor consumer rescission nullified security interest, barring foreclosure and the consumer was not required to tender back the proceeds).

Accordingly, the Plaintiff's Adversary Complaint does not seek tender by the Thayers of the amount equal to the proceeds of the loan that were distributed to TCF as it is undisputed that the Plaintiff failed to follow the delay in performance rule by prematurely releasing the loan proceeds to TCF and the two credit card companies.

C. If the Consumer Rescinds After the Three Day Rescission Period But During the Extended Three Year Rescission Period, the Requirement to Tender Under TILA is an Unsecured Debt.

If a consumer rescinds during the three year extended rescission period and assuming the lender follows the complies with the statute within the requisite 20 day period from the date of the rescission, the consumer then must tender back the monies it received from the refinancing less the financing charges, interest, and closing costs. *William v. Gelt Financial, Corp*, 237 B.R. 590 (E.D. Pa. 1999)(classifying claim as unsecured by way of TILA rescission); *In re Rodrigues*, 278 B.R. 683 (D.R. I. 2002); *Murray v. First National Bank*, 239 B.R. 728 (Bankr. E.D. Pa. 1999)².

In this case, it is undisputed that the Thayers rescinded within the three day rescission period and that Plaintiff failed to honor their rescission by failing to delay its

² *Hill v. Albright Mortgage Co.*, 213 B.R. 934 (Bankr D. Md. 1996), *aff'd*, 213 B.R. 943 (D. Md. 1997); (creditor only entitled to unsecured claim because of debtor rescission); *In re Lombardi*, 195 B.R. 569 (Bankr. D. Miss. 1995); *In re Whitley Inc.*, 177 B.R. 142 (Bankr. D. Mass 1995)(TILA creditor's claim unsecured); *In re Myers*, 175 B.R. 122 (Bankr. D. Mass. 1994); *In re Brown* 134 B.R. 134 (Bankr. E.D. Pa. 1991); *In re Moore*, 117 B.R. 135 (Bankr. E.D. Pa. 1990); *In re Brown*, 106 B.R. 852 862 (Bankr. E.D. Pa. 1989); *In re Perkins*, 106 B.R. 106 (E.D. Pa. 1989); *In re Gurst*, 79 B.R. 969, 978 (Bankr. E. D. Pa. 1987); *In re Tucker*, 74 B.R. 923 (Bankr. E.D. Pa. 1987).

performance. *See* (Aff. J. Thayer ¶¶ 14-15 and Ex. A-D). Therefore, the Thayers have no duty to tender under TILA and if even if they did such amount would be unsecured as it is not supported by a mortgage under Minnesota law. The loan with Plaintiff in 2003 and the TCF Note and mortgage are separate and distinct. In any event, Plaintiff in the Adversary Complaint, has not made a claim under TILA for tender of funds.

To reiterate, a rescission under TILA does not void transactions with third parties and there is no statutory or case supporting such a position. This is not surprising as TILA recession is very different that the effects of rescission under state law. *See Large v. Conseco Fin. Serv. Corp*, 292 F.3d 49 (1st Cir. 2002)(TILA rescission significantly different from common law rescission); *Family Financial Services v. Spencer*, 677 A.2d 479 (Conn. Ct. App. 1996)(TILA differs greatly from common law rescission.

III. SUMMARY JUDGMENT IS APPROPRIATE AS BOTH TCF, THE ASSIGNOR AND PLAINTIFF, THE ASSIGNEE, HAVE ADMITTED THAT THE TCF NOTE HAS BEEN PAID IN FULL AND SATISFIED.

The Thayers has asserted the defense of payment. This defense is being asserted both offensively on the Thayers' Counterclaims and defensively in opposition to Counts I and II of Plaintiff's Adversary Complaint.

As in initial matter, the Thayers must present evidence establishing a *prima facie* case for payment of the debt in question or in the alternative, a fact issue regarding payment (in opposition to Plaintiffs' Motion).

Under Minnesota law, a payment of a debt stemming from a promissory note is paid when monies are sent to the creditor which are accepted. Minn. Stat. §§ 336.3-310 (a) and (b)(certified or uncertified check is discharged to same extent if an amount of money equal to the amount of the instrument were taken in payment of the obligation);

and 336.3-602 (Payment). Acceptance of a check for payment of an obligation is a condition of payment and not a final payment until the check is presented and honored. *In re Anderson*, 181 B.R. 943, 951 (Bkrcty D. Minn. 1995).

Significantly, once the check is presented and honored full payment is accomplished and the underlying debt is extinguished. *Village of New Brighton v. Jamison* 278 N.W.2d 321, 325 (Minn. 1979); *Olsen v. Preferred Risk Mutual Insurance Company*, 170 N.W.2d 581, 584 (Minn. 1969)(holding that payment is final when check is presented and honored)(citations omitted). If a holder fails to present a person's check for payment within a reasonable time, the delay in presentment discharges all liability on the instrument. *Goblirsch v. Heikes*, 547 N.W.2d 89 (Minn. Ct. App. 1996)(citing *Commercial Inv. Trust v. Lundgren-Wittensten Co.*, 85 N.W.531, 532 (Minn. 1927)).³

It is undisputed that the TCF note was paid off on September 3, 2003. First, in a letter to the Thayers dated September 17th, 2003, TCF, confirmed that the TCF Loan had been fully paid and satisfied. See (Aff. J. Thayer ¶ 10 and Exs. B and C). The September 17, 2003, TCF letter stated that the Thayers' loan with TCF was "paid in full." (emphasis added). (Aff. J. Thayer ¶ ¶ 10-15 and Ex. B). Second, TCF also sent the Thayers a Final Escrow Account Disclosure dated September 8, 2003 which stated that the "LOAN WAS PAID OFF." (emphasis in original). (Aff. of J. Thayer ¶ 11 and Ex. C).

Third, several months later, on February 5, 2004, TCF again confirmed that the

³ See also *Tobiason v. First State Bank of Ashby* (Minn. 1928). In *Tobiason* a plaintiff paid a debt to a creditor bank via a check. The bank accepted the check and told plaintiff he had paid in full. *Id.* The creditor bank accepted a check back from the Plaintiff's bank rather than cash. The plaintiff's bank became insolvent and the creditor bank sought payment from plaintiff. The *Tobiason* court found that the plaintiff

TCF Note had been paid in full and fully satisfied. (Ex. D to Aff. J. Thayer ¶ 12). TCF in a letter to the Thayers dated February 5, 2004, stated:

The above-referenced loan was paid in full SEPTEMBER 2, 2003. A satisfaction/release of mortgage was mailed to the party that remitted the payoff funds. At that time, the satisfaction/release of mortgage should have been taken to the County Recorder's Office and recorded removing the lien from the property.

(emphasis in original) (Ex. D to Aff. J. Thayer ¶ 13). Finally, Plaintiff in its Adversary Complaint admits that TCF was paid.

As of the date of the February 17, 2004, "assignment", TCF had no right under the loan or mortgage to assign and the purported assignment had the many a similar effect of a quitclaim deed which transfers any interest of the grantor to the grantee, *if any*. It is axiomatic that an assignee steps into the shoes of an assignor and that the assignee can have no greater rights than the assignor. It follows that is no genuine issue of material fact and summary judgment should be granted in the Thayers' favor.

IV. THE ASSIGNMENT OF THE TILA CLAIM TO PLAINTIFF IS INVALID UNDER FEDERAL AND STATE LAW.

The trustee in this matter has assigned the Thayers' TILA claim for monetary damages and related state law consumer claims that they have against the Plaintiff to the Plaintiff.

The assignment of a TILA claim to a lender who is in or is the subject of the very claim that is being assigned is completely contrary and at war with Congress' desire to protect consumers from unscrupulous lenders. *See* 15 U.S.C. § 1601 (Declaration of

had paid in full because the bank had accepted the draft as payment. *Id.* Even though the bank did not get any actual money of plaintiff, the debt was still held to be satisfied. *Id.*

Purpose of the Truth in Lending Act). As an initial matter, Plaintiff is not a consumer within the meaning of the TILA, 15 U.S.C. 1602(h) and under 15 U.S.C. § 1640(a)(Civil Remedies) only persons aggrieved by creditors have standing to seek relief under the TILA.

It is important to point out what this issue is not. The question of whether the Chapter 7 Trustee could bring the TILA claim is not at issue. Rather, the issue here is manifestly different, to wit, whether an assignment by the Chapter 7 Trustee of a Truth in Lending Act claim to a third party (that paradoxically in this case is the very party accused of the underlying wrongdoing) is valid under federal substantive law.

Generally, the assignment of federal claims is governed by federal common law. *Martin v. Morgan Drive Away, Inc.* 665 F.2d 598, 605 (5th Cir. 1982). Federal common law has consistently applied the substantive law of the state in which the debtor resides or the forum where the claim arose. *Id.* (citing *Sampliner v. Motion Picture Co.*, 255 F. 244 (2nd Cir. 1918), *rev'd on other grounds* 254 U.S. 233 (1920); *see also* Fed. R. Civ. P. 17(b) ("The capacity of a corporation *to sue* or be sued shall be determined by the law under which it was organized.")(emphasis added).

Generally, claims personal to a party are not assignable. The major rational behind this traditional rule was to prevent champerty and maintenance. *Can Do, Inc. v. Manier Herod*, 922 S.W.2d 865, 867 (Tenn. 1996). Champerty is a bargain with a plaintiff or defendants in a cause to divide the matter sued for, if they prevail whereupon the champertor is to carry on the party's suit at his own expense. *Id.* Maintenance has been defined as an officious intermeddling in a suit which no way belongs to one by maintaining or assisting either party with money or otherwise to prosecute or defeat it. *Id.*

Once must then examine, whether under the laws of the State of Minnesota, a consumer's statutorily created cause of action against a lender for violations of the Truth in Lending Act can be sold to a third party.

No Minnesota court has determined whether a claim under the Truth in Lending Act can be sold to third parties. If the Thayers could not sell their TILA claim prior to filing for bankruptcy under federal and state law, neither can the Chapter 7 Trustee. By examining how Minnesota law construes other causes of action is helpful to ascertaining how a Minnesota court would likely address this issue.

In Minnesota, the traditional test of assignability was whether the claim survived the death of the holder and did not arise under personal injury. *See* Minn. Stat. §§573.01-02 (1992); *Jandra v. Taylor Lakefield Farmer's Union*, 185 N.W. 656, 658 (1921). The traditional rule has been abandoned in favor of a more progressive and modern view. *Wagner v. McDonald*, 509 N.W.2d 188, 190 (Minn. 1993). The issues of whether a claim is assignable is one of public policy. *Id.*

The *Wagner* court held that attorney malpractice claims are not assignable. "The question in this case is not whether clients would be able to make claims against lawyers for malpractice. The question is whether to allow clients to sell-off their claims for pursuit by others." *Id.* (citing *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338, 333-34 (Ind. 1991)). One of the main issues the court cited was the risk of collusive suits that would frustrate the purposes of the cause of action in the first place. *Id.* at 191-93. Based on numerous concerns the *Wagner* court held that legal malpractice claims in Minnesota cannot be sold to third parties.

The North Carolina Supreme Court has held that unfair practice claims created by statute are not assignable because they are personal in nature. *Investors Title Ins. Co. v. Herzig*, 413 S.E. 2d 268, 271 (N.C. 1992). The North Carolina legislature in creating the claims wanted to provide a remedy for aggrieved consumers and to provide a method to maintain ethical standards for dealings between person engaged in business and to achieve the ultimate goal of protecting the consumer public. *Id.* Compare 15 U.S.C. § 1602 (Congress' declaration for purpose for enacting the Truth in Lending Act).

In this case, Congress clearly intended TILA claims to be personal to consumers and it cannot be gainsaid that the drafters of this remedial legislation would be stunned if a creditor could buy a consumers' own claim against it. A sale of a TILA claim in these circumstances would completely undermine and would make a mockery of TILA and parallel state consumer protection laws.

In this Case Chapter 7 Trustee indicated to your undersigned that she was not interested in pursuing the TILA and related claims and that she wanted to sell them. (Aff. of K. Oliver). Plaintiff outbid the Thayers by about \$100.00. There were several rounds of bidding and Plaintiffs' continually raised their bid on successive rounds of bidding making the Thayers attempt to purchase the TILA and other claims fruitless due to their economic circumstances vis-à-vis a mortgage company. (Aff. of K. Oliver ¶¶ 4-7)

The tender was to be accepted but for the Plaintiffs' bid; the Thayers informed the Chapter 7 Trustee that took issue with the Trustee's ability to assign a TILA claims to a non-consumer third party under applicable law. (Aff. of K. Oliver ¶¶ 2-6) Just one day after the tender of the funds, the Thayers sought, well in advance of the actual sale, a

declaratory judgment that any proposed sale to Plaintiff was invalid and that its bid should be declared valid as of the date of the tender was accepted.

The Thayer felt they had to act quickly as it is arguable that the statute of limitations was about to run out and they therefore sought a declaratory judgment that the Court should rule that the assignment to Plaintiff was invalid and that the TILA should vest to the Thayers. (Aff. of K. Oliver ¶¶ 4-8). Arguably, at the time of the sale to Plaintiff, the cause of action under TILA had expired.

Due to the highly unusual situation in this case regarding the sale, a dismissal under Rule 12(b) and the Thayers' prompt commencement of a declaratory judgment action regarding the TILA assignment coupled with the possibility of a looming statute of limitations deadline, Plaintiff's Motion to dismiss Counts III and IV of the Thayers' counterclaims should be denied. Plaintiff has failed to meet its heavy threshold of establishing beyond a reasonable doubt that the Thayers have failed to state claims under Rule 12(b)(6).

CONCLUSION

Defendants, Bradley R. Thayer and Judith N. Thayer, respectfully request that this Court: 1) Deny Plaintiff's Motion to Dismiss be denied in its entirety, 2) that Defendants' Cross Motion for Summary Judgment be granted as to its counterclaims and/or that summary judgment on Plaintiff's claims be granted in Defendants' favor and that such claim should be dismissed with prejudice; 3) that in the alternative, if the Court is disinclined to grant the motion(s) before it in this matter, that the Court find that there are material fact disputes that prevents the granting of a dispositive motion or motions; 4)

That the Court issue and order and judgment with the effect of satisfying the mortgage of record on Defendants' homestead.

Respectfully submitted,

THE OLIVER GROUP, PLC

Dated: 15 October 2004

/s/ Karl A. Oliver

Karl A. Oliver, Esq., # 0269852
1935 W. County Road B2, Suite 415
Saint Paul, Minnesota 55113
Telephone: 651-636-7960

**ATTORNEYS FOR BRADLEY THAYER
AND JUDITH THAYER**

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

**Chapter 7 Bankruptcy
Bky 04-327235 (GFK)
Adv. 04-3338**

Bradley R. Thayer and Judith N. Thayer,

Debtors.

In re:

American Residential Mortgage, LP,

Plaintiff,

v.

Bradley R. Thayer and Judith N. Thayer,

Defendants.

ORDER

The Court has considered Plaintiffs' Motion to Dismiss and Defendants' Cross Motion for Summary Judgment. Heather Thayer, Esq. appeared on behalf of Plaintiff. Karl A. Oliver Esq. appeared on behalf of Defendants.

The Court, being duly advised in the premises, upon all of the files, records and proceedings herein, now makes and enters the following Order.

1. Defendants' Motion to for Summary Judgment in their favor on Counts I is hereby: **GRANTED;**

2. Defendants Motion for Summary Judgment in their favor on Count II of Plaintiffs' Adversary Complaint is hereby: **GRANTED**, based upon mootness.
3. Defendants' Motion for Summary Judgment on Counts I and II of its Counterclaims are hereby: **GRANTED**;
4. Defendants' Motion for Summary Judgment on the affirmative defense of payment as to Counts I and II of Plaintiffs' Adversary Complaint is hereby: **GRANTED**;
5. Defendants' Motion to discharge the mortgage held by Plaintiff on the Thayers' homestead is: **GRANTED**; and
6. If a satisfaction of mortgage is not filed within 10 days of the date of this order, the filing of a certified copy of this order shall discharge such mortgage.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Date: _____

Gregory F. Kishel
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

**Chapter 7 Bankruptcy
Bky 04-327235 (GFK)
Adv. 04-3338**

Bradley R. Thayer and Judith N. Thayer,

Debtors.

In re:

American Residential Mortgage, LP,

Plaintiff,

v.

Bradley R. Thayer and Judith N. Thayer,

Defendants.

AFFIDAVIT OF KARL A. OLIVER

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

Karl A. Oliver, upon first being duly sworn on oath, deposes and states as follows:

1. I am counsel for the Defendants in the above-referenced matter and I am submitting this Affidavit in Support my clients' Motion for Summary Judgment and in opposition to Plaintiff's Motion.

2. I have personal knowledge of the facts and documents set forth in this

affidavit and all of the documents referenced herein in and attached to this Affidavit are true and correct copies and they are documents I have personal knowledge of.

3. On February 18, 2004, TCF purportedly "assigned" the TCF Note to ARM and attached is a true and correct copy of such assignment which is attached hereto as Exhibit A; I received a copy of this assignment from Plaintiff's counsel in June of 2004.

4. The Chapter 7 Trustee indicated to your undersigned that she was not interested in pursuing the TILA and related claims and that she wanted to sell them.

5. On August 27, 2004, the Thayers tendered \$650.00 to the Chapter 7 Trustee.

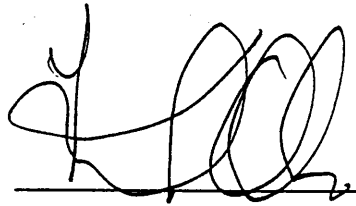
6. Plaintiff outbid the Thayers by about \$100.00. There were several rounds of bidding and Plaintiffs' continually raised their bid on successive rounds of bidding making the Thayers attempt to purchase the TILA and other claims fruitless due to their economic circumstances vis-à-vis a mortgage company.

7. The tender was to be accepted but for the Plaintiffs' bid; the Thayers informed the Chapter 7 Trustee that took issue with the Trustee's ability to assign a TILA claims to a non-consumer third party under applicable law.

8. The Thayer felt they had to act quickly as it is arguable that the statute of limitations was about to run out and they therefore sought a declaratory judgment that the Court should rule that the assignment to Plaintiff was invalid and that the TILA should vest to the Thayers. (Aff. of K. Oliver ¶)


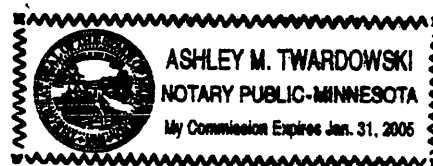
FURTHER YOUR AFFIANT SAYETH NAUGHT

Date: 10-15-04



Karl A. Oliver

Subscribed and sworn before me this 15th
day of October 2004.


Notary Public

WHEN RECORDED MAIL TO
TCF Mortgage Corporation
801 Marquette Ave S
Minneapolis, MN 55402

LN# 811028920

SPACE ABOVE THIS LINE FOR RECORDER'S USE

Corporation Assignment of Mortgage

FOR VALUE RECEIVED, the undersigned hereby grants, assigns and transfers to

American Residential Mortgage, LP

all beneficial interests under that certain Mortgage dated September 11, 2002 to secure \$150,700.00
executed by Bradley E. Thayer and Judith Thayer, Husband and Wife

to American Residential Mortgage, LP
and recorded as Instrument No. 3277617 on November 13, 2002 in book ,page , of Official records in the
County Recorder's office of Washington County, MN describing land therein as described in said Mortgage referred to herein
Commonly known as address: 9337 Jarrod Avenue
Cottage Grove, MN 55016

TOGETHER with the note or notes therein described or referred to, the money due and to become due thereon

TCF Mortgage Corporation

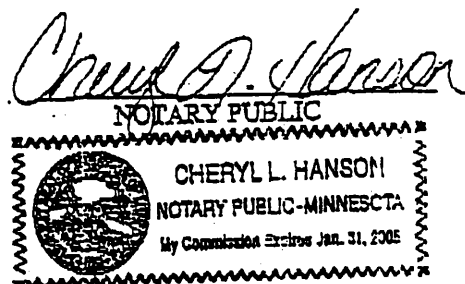
By: Paul A. McColley, Vice President

STATE OF MINNESOTA)
COUNTY OF HENNEPIN) SS

Be It Remembered That On This 18TH DAY OF FEBRUARY 2004,
before me, the undersigned authority, personally appeared Paul A. McColley who is the Vice President
of TCF Mortgage Corporation

who is personally known to me and I am satisfied (s)he is the person who signed the within instrument, and (s)he acknowledged
that (s)he signed and delivered the same as such officer aforesaid, and that the within instrument is the voluntary act and deed of
such corporation, made by virtue of a Resolution of its Board of Directors.

WITNESS my hand and official seal
(seal)



Prepared By: Paul A. McColley

Ex. A

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

**Chapter 7 Bankruptcy
Bky 04-327235 (GFK)
Adv. 04-3338**

Bradley R. Thayer and Judith N. Thayer,

Debtors.

In re:

American Residential Mortgage, LP,

Plaintiff,

v.

Bradley R. Thayer and Judith N. Thayer,

Defendants.

AFFIDAVIT OF JUDITH THAYER

STATE OF MINNESOTA)
) ss.
COUNTY OF WASHINGTON)

Judith Thayer, upon first being duly sworn on oath, deposes and states as follows:

1. I am submitting this Affidavit in Support of my and my husband's Motion for Summary Judgment and in opposition to Plaintiff's Motion.
2. I have personal knowledge of the facts and documents set forth in this

affidavit and all of the documents referenced herein in and attached to this Affidavit are true and correct copies and they are documents I have personal knowledge of.

3. My husband and I decided to refinance the TCF Mortgage in August of 2003.

4. On August 28, 2003, my husband and I rescinded the new ARM loan by signing the Notice of Right to Cancel provided to each of us at the loan closing and I mailed, via certified mail, the cancellation to ARM at the address provided in the notice and I personally mailed the envelope to ARM.

5. On August 29, 2003, ARM signed a certified mail receipt acknowledging receipt of the Notice of Cancellation; I received a confirmation form in the mail from the post office. I have a true and correct copy of the signed receipt from ARM which I have attached as **Ex. A** to my affidavit.

6. The funds subject to the ARM Loan were released to TCF and to Discover on or about August 29, 2003.

7. The proceeds were received by Discover on August 30, 2003, thus paying off the account in full and therefore the checks were mailed out at the earliest on August 29, 2003.

8. On or about August 29, 2004, ARM also mailed a check in the amount of \$4,093.46 to my husband which he returned to ARM uncashed.

9. In September of 2003, the TCF Note was paid in full.

10. In a letter to the my husband and myself dated September 17th, 2003, TCF, confirmed that the TCF Loan had been fully paid. See Ex. B (Letter from TCF dated 9-17-03).

11. The letter stated that the Thayers' loan with TCF was "paid in full." (emphasis added).

12. TCF also sent us a Final Escrow Account Disclosure dated September 8, 2003 which stated that the "LOAN WAS PAID OFF." (emphasis in original). See (Ex. C).

13. Several months later, on February 5, 2004, TCF again confirmed that the TCF Note had been paid in full and fully satisfied. See (Ex. D)(Letter from TCF dated 2-5 04

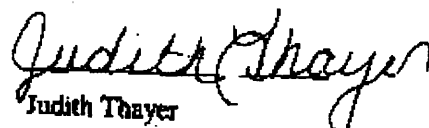
14. TCF in a letter to the Thayers dated February 5, 2004, stated:

The above-referenced loan was paid in full SEPTEMBER 2, 2003. A satisfaction/release of mortgage was mailed to the party that remitted the payoff funds. At that time, the satisfaction/release of mortgage should have been taken to the County Recorder's Office and recorded removing the lien from the property.

15. I consider the TCF Note to be paid in full.

FURTHER YOUR AFFLIANT SAYETH NAUGHT

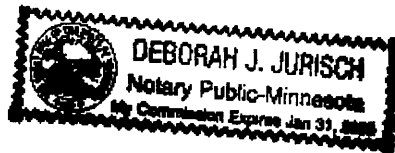
Date: 10/15/04


Judith Thayer

Subscribed and sworn before me this 15
day of October 2004.

Deborah J. Jurisch

Notary Public



SENDER COMPLETE THIS SECTION

Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. Print your name and address on the reverse so that we can return the card to you. Attach this card to the back of the mailpiece, not on the front. If space permits, attach a label.

Article Addressed to: **American Express Mortgage**

35 Leveson Avenue

Suite 13

Maplewood, MN 55117

Article Number (Transfer from service label)

PS Form 381 August 2001

COMPLETE THIS SECTION ON DELIVERY

A. Signature of Addressee
[Signature]

B. Received by (Printed Name) *[Signature]*

C. Date of Delivery *8/29/03*

D. Is delivery address different from item 12? ☐ Yes ☒ No
If YES, enter delivery address below:

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☒ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery (Extra Fee) ☐ Yes

7002 3150 0001 4971 8769

Domestic Return Receipt

102595 02-M-1540

Ex. A

UNITED STATES POSTAL SERVICE

First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

Sender Please print your name, address, and ZIP+4 in this box •

Judith T. Taylor
9337 Canrod Ave
Cottages Grove, MN.
55014

TCF MORTGAGE CORPORATION

09/17/03

BRADLEY R THAYER
JUDITH THAYER
9337 JARROD AVE

COTTAGE GROVE MN 55016-5003

Re: TCFMC Loan Number 0811028920

Dear Mortgagor:

Enclosed please find check number 57311 in the amount of \$1187.00. This check is being returned due to the above referenced loan number being paid in full.

If you have any questions regarding this matter, please contact our Customer Service Department at 1-800-950-1034 or 612-661-7501.

Sincerely,
TCF Mortgage Customer Service Department

ajh

TO ACCESS YOUR MORTGAGE LOAN INFORMATION
GO TO WWW.TCFMORTGAGE.COM

5-93-C2

EX B

TCF MORTGAGE CORPORATION
801 MARQUETTE AVENUE
MINNEAPOLIS, MN 55402
(612) 661-7501 OR 800-950-1034

ANNUAL ESCROW ACCOUNT DISCLOSURE STATEMENT

BRADLEY R THAYER
JUDITH THAYER
9337 JARROD AVE S
COTTAGE GROVE MN 55016



001355 7143 9AGTD 910968

FINAL ESCROW ACCOUNT DISCLOSURE STATEMENT

LOAN NUMBER: 0811028920 JULY 2003 THRU JUNE 2004 DATE: 09/08/03

PAST YEARS PAYMENT BREAKDOWN: PRIN & INTEREST 915.67
ESCROW PAYMENT 233.06
ROUNDING AMT -0.42
SHORTAGE PYMT 38.69
TOTAL PAYMENT 1187.00

MONTH	PAYMENTS TO ESCROW		PROJECTED	PAYMENTS FROM ESCROW		DESC.	ESCROW BALANCE	
	PROJECTED	ACTUAL		DESC.	ACTUAL		PROJECTED	ACTUAL
JUL 03	233.06	271.33	0.00	0.00	STARTING BAL.	699.27	234.92	
AUG 03	233.06	0.00	0.00	0.00		932.33	506.25LP	
SEP 03	233.06	85.47	0.00	0.00		1165.39	508.25	
OCT 03	233.06	0.00	838.00TAXES/COUNTY	0.00		1398.45	591.72	
NOV 03	233.06	0.00	0.00	0.00		793.51	0.00	
DEC 03	233.06	0.00	0.00	0.00		1026.57	0.00	
JAN 04	233.06	0.00	0.00	0.00		1259.63	0.00	
FEB 04	233.06	0.00	0.00	0.00		1492.69	0.00	
MAR 04	233.06	0.00	0.00	0.00		1725.75	0.00	
APR 04	233.06	0.00	1120.81HAZARD INS	0.00		1958.81	0.00	
MAY 04	233.06	0.00	838.00TAXES/COUNTY	0.00		1071.06	0.00	
JUN 04	233.06	0.00	0.00	0.00		466.12	0.00	
TOTALS	2796.72	356.80	2796.81	0.00		599.18	0.00	

AN ASTERISK (*) INDICATES A DIFFERENCE IN EITHER THE AMOUNT OR DATE OF THE ANTICIPATED PAYMENTS FROM ESCROW AND THE ACTUAL PAYMENTS FROM ESCROW. THE INFORMATION PROVIDED DOES NOT REQUIRE ANY ACTION ON YOUR PART. IF YOU HAVE ANY QUESTIONS PLEASE CALL OUR TOLL FREE NUMBER 1-800-950-1034.

THIS INFORMATION IS BEING PROVIDED TO YOU BECAUSE YOUR LOAN WAS PAID OFF.

Ex.C

TCF MORTGAGE

corporation

FEBRUARY 5, 2004

JUDITH THAYER
9337 JARROD AVENUE
COTTAGE GROVE, MN 55016-5003

RE: TCF Loan Number: 811028920
Mortgagor: BRADLEY R. AND JUDITH THAYER
Property Address: 9337 JARROD AVENUE, COTTAGE GROVE, MN
Mortgage Dated: 09-11-2002
Document Number: 3277617
Your File No.:

To Whom It May Concern:

The above mentioned loan was paid in full SEPTEMBER 2, 2003. A satisfaction/release of mortgage was mailed to the party that remitted the payoff funds. At that time, the satisfaction/release of mortgage should have been taken to the County Recorder's Office and recorded removing the lien from the property.

Should you have any further questions regarding this matter, please feel free to contact me directly at my number listed below.

Sincerely Yours,



Sharon Thielman
Payoff Specialist
Payoff Department
612-661-7553

Ex. D